

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the adoption of New)
Rules I through XIV pertaining to Wind)
Generation Facility Decommissioning)
and Bonding)
NOTICE OF ADOPTION
(ENERGY)

TO: All Concerned Persons

1. On November 9, 2017, the Department of Environmental Quality published MAR Notice No. 17-394 regarding a notice of proposed amendment of the above-stated rules at page 1995, 2017 Montana Administrative Register, Issue Number 21.

2. The department has adopted New Rule V (17.86.107), New Rule VI (17.86.110), New Rule IX (17.86.115), New Rule X (17.86.116), New Rule XI (17.86.117), New Rule XII (17.86.120), New Rule XIII (17.86.121), and New Rule XIV (17.86.122) exactly as proposed. The department has adopted New Rule I (17.86.101), New Rule II (17.86.102), New Rule III (17.86.105), New Rule IV (17.86.106), New Rule VII (17.86.111), and New Rule VIII (17.86.112) as proposed, but with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (17.86.101) DEFINITIONS In this subchapter, the following definitions apply:

(1) "Abandon" or "abandonment" means generating 10 percent or less of the ~~cumulative nameplate capacity of the facility's turbines~~ monthly maximum generation potential, as determined by the facility's nameplate capacity, each month for 12 consecutive months.

(2) through (8) remain as proposed.

(9) "Owns a 10 percent or greater share of the wind generation facility" means ~~at commencement of commercial operation and thereafter~~, having ownership of 10 percent or greater in capital stock of the corporation that owns the facility or having a 10 percent or greater ownership interest in a partnership, or limited liability corporation that owns the facility;

(i) for a facility that commenced commercial operation on or before May 3, 2017, on May 3, 2017, and thereafter; and

(ii) for a facility that commenced commercial operation after May 3, 2017, at commencement of commercial operation and thereafter.

(10) and (11) remain as proposed.

(12) "Significant investment" means a capital ~~equipment~~ investment in property associated with a wind generation facility that the owner has demonstrated to the department will extend the useful life of the wind generation facility by more than 5 years ~~of 50 percent or greater of the initial capital equipment investment~~. The equipment project must be completed in three years or less. Should a facility remove all wind turbines and existing pads and install new wind turbines on new pads, the facility is a new facility and not a repurposed facility.

(13) and (14) remain as proposed.

NEW RULE II (17.86.102) OWNER RESPONSIBILITIES (1) through (3) remain as proposed.

(4) The owner of a wind generation facility that commenced commercial operation on or before July 1, 2018, shall submit in writing the following to the department on or before July 1, 2018, ~~although the~~ The department may, but is not required to, review these initial decommissioning plans and information for completeness or set a bond amount at this time:

(a) the date that the facility commenced commercial operation; ~~and~~

(b) a decommissioning plan in accordance with the requirements of ARM 17.86.105;

(c) identification of the landowner or landowners on which the wind generation facility is located; and

(d) if the landowner or landowners identified pursuant to (4)(c) are not governmental entities whether the landowner or landowners have an ownership interest in the wind generation facility and, if so, a detailed description of the interests.

(5) The owner of a facility that commences commercial operation after July 1, 2018, shall submit to the department the information required in ~~(2)~~ (4) within six months of commencing commercial operation. The department may, but is not required to, review these initial submissions for completeness, or set bond amounts at this time.

(6) remains as proposed.

(7) The owner shall allow access in a timely manner and accompany the department for an inspection of the facility to verify the adequacy of a new or updated decommissioning plan for purposes of determining the bond amount. The department shall propose in writing, the scope and schedule of any such inspection at least two weeks in advance of the inspection. Department representatives shall comply with site safety and general access restrictions while at the facility.

NEW RULE III (17.86.105) DECOMMISSIONING PLAN (1) A decommissioning plan must include:

(a) remains as proposed.

(b) as-built plans, including general structural and electrical information, relative to the calculation of the bond for all facilities and all disturbances associated with the facility. The as-built plans must include an affidavit signed by an owner or any person authorized to act on the owner's behalf attesting to the completeness and accuracy of the as-built plans or be certified by a professional engineer that the as-built plans are complete and accurate. The department may allow redaction, the filing of a less detailed plan, or treatment of all or a portion of the plan as confidential information if the owner demonstrates to the department's satisfaction that the information or plan may be protected pursuant to 2-6-1003, MCA;

(c) any agreement(s) signed by all landowners and facility owners providing for alternative reclamation or the non-removal of buildings, cabling, electrical components, roads or any associated facilities. The agreement may be specific to decommissioning or it may be a more general agreement with specific provision relating to decommissioning. A general agreement may contain redactions to

protect information that is not necessary for the department's review;

(d) a description of the manner in which the facility will be decommissioned and a proposed decommissioning schedule, which, except as provided in (1)(c), must include:

(i) dismantling and removal of all overhead electrical transmission lines and structures, transformers, buildings, and all other ancillary equipment and debris from operation of the facility that is not associated with interconnecting the wind generation facility into the electric grid;

(ii) remains as proposed.

(iii) removal of wind turbine foundations and other concrete foundations and slabs to a minimum depth of 48 ~~36~~ inches below natural grade or deeper an alternative depth as approved by the department if required appropriate for the post operation land use;

(iv) reclamation of the facility site to the approximate original surface topography that existed prior to the start of the construction of the facility with grading, topsoil application over the disturbed areas at a depth similar to that in existence prior to the disturbance, ~~and~~ reseeding, and revegetation to achieve the same utility as the surrounding area at the time of decommissioning to prevent adverse hydrological effects;

(v) remains as proposed.

(vi) removal and grading of all access roads to pre-construction or natural grade as appropriate;

(e) and (f) remain as proposed.

NEW RULE IV (17.86.106) DETERMINATION OF BOND AMOUNT (1) and (2) remain as proposed.

(3) In determining the amount of a bond required in accordance with ARM 17.86.107, the department shall provide the owner with a preliminary bond determination, consult with the owner, and consider:

(a) through (4) remain as proposed.

NEW RULE VII (17.86.111) REPLACEMENT OF BOND (1) If the owner transfers ownership to a successor owner, the department shall release the bond posted by the owner in accordance with this rule within 90 calendar days ~~if the successor owner posts a bond with the department in an amount equal to, or greater than, the bond posted by the incumbent owner.~~ The successor owner shall, within 90 days of the transfer, provide a bond that meets the requirements of this subchapter.

(2) The owner must receive approval from the department prior to replacing any bond. The department shall approve a replacement bond if it meets the requirements of this subchapter.

NEW RULE VIII (17.86.112) ADJUSTMENT OF BOND AMOUNT (1) Once every five years an owner may request a reduction of the required bond amount upon submission of evidence to the department proving that decommissioning work, reclamation, or other circumstances will reduce the maximum estimated cost to the department to complete decommissioning and therefore warrant a reduction of the

bond amount. Prior to denying the request in whole or in part, the department shall consult with the owner.

(2) The department shall review each decommissioning plan and bond amount every five years. The department may increase the amount of the bond if the facility has expanded or the cost to decommission a facility otherwise increases. The department shall notify the owner of any proposed bond increase and provide the owner an opportunity for an informal conference on the proposal. If the department determines that the bond amount must be increased, it shall provide the owner with a written justification for the increase. The owner shall increase the bond within 90 days of receiving the department's revised bond amount.

3. The following comments were received and appear with the department's responses:

COMMENT NO. 1: The department is urged to adopt rules for bonding and reclamation that are equivalent to rules that apply to oil wells, open cut mines, etc.

RESPONSE: The bonding rules are patterned after bonding rules for mine reclamation that are adopted pursuant to Title 82, chapter 4, MCA, including opencut mine bonds.

COMMENT NO. 2: If bond amounts are increased, it should be subject to appeal, and following a conference with the stakeholders. Most of the proposed rules do not include the opportunity for collaborative discussion before final determination of the initial and future increased bond amounts and the rules are silent regarding appeal rights.

RESPONSE: To ensure that the owner has an opportunity to present information to the department prior to establishment of the bond amount, the department has amended New Rule IV to provide that the department must consult with the owner prior to setting a bond amount. New Rule VIII already provides the owner with the right to an informal conference prior to adjusting the bond amount. With regard to appeal, the statute provides for appeals to the Board of Environmental Review only for the assessment of penalties for failure to post bond with the department. However, under case law of the Montana Supreme Court, an owner has the right to challenge the department's bond calculation in district court. See *Johansen v. State*, 288 Mont. 39, 955 P.2d 653 (1998).

COMMENT NO. 3: There should be assurance that these rules provide an adequate framework and financial resources to support the decommissioning and remediation of commercial wind farm sites with no financial burden to the state.

RESPONSE: Bonding of wind generation facilities, to the extent required by 75-26-304, MCA, is required by the proposed rules to be set at a sufficient amount to cover decommissioning and remediation costs incurred by the state if the owner fails to conduct decommissioning itself. However, if a facility is abandoned at a time when 75-26-304, MCA does not require bonding, there would be no financial resources for the state to conduct decommissioning and remediation on either public or private lands. The department does not have authority to require bonding at a time that it is not required by the statute. No bonding is required until the 15th or

16th year following commencement of commercial operation, as applicable, and no bonding is required during the first five years after being repurposed.

COMMENT NO. 4: New Rule VI should be clearer about the department's authority to levy penalties for failure to submit a decommissioning plan or non-compliance with any part of the rules. As a benefit to stakeholders, the rules should specify or reference standard operating procedures for levying penalties when not explicitly stated within the rule.

RESPONSE: Under 75-26-309(9), MCA, penalties may be assessed only for failure to provide a bond on time. The department does not have statutory authority to assess penalties for failure to submit a decommissioning plan or non-compliance with any other parts of the rule. Title 75, chapter 26, part 3, MCA does not provide any additional operating procedures for assessment of penalties.

COMMENT NO. 5: There should be clarification of the definition of the term "abandon" in New Rule I(1). It is unclear how many megawatt hours per month would constitute the threshold to trigger abandonment.

RESPONSE: The department agrees. The rule has been modified to provide that a facility is to determine its monthly potential power capacity output based on the nameplate capacity of each turbine at the facility and the total hours in each month. If 10 percent or less of each month's potential power is produced, the month qualifies as a month towards abandonment. Twelve consecutive months at or below 10 percent of the facility's turbine power potential meets the definition for abandonment. The proposed changes provide additional clarity on when a facility is abandoned and do not substantively change the intent of the previously proposed definition.

COMMENT NO. 6: The department received both supportive and opposing comments about retaining the requirement in New Rule I(9) that 10 percent ownership must be established at the commencement of commercial operation and be retained through the operating life of the project. Supporters believe that the department has the authority to establish this requirement and said this specification brings clarity to the 10 percent ownership exemption, preventing ambiguity and confusion. Opponents believe it is up to the legislature to impose an additional requirement such that 10 percent ownership shall be from the time commercial operation commences and the department does not have this authority.

RESPONSE: Section 75-26-304(8)(b), MCA, the statute implemented by this provision, became effective May 3, 2017, and provides that an owner is exempt from the bonding requirement if the landowner "owns" a 10 percent or greater share of the facility. Furthermore, the statute provides that the 10 percent ownership is to be "determined by the department." Finally, the proposed rule language is overbroad for its stated purpose, which was to prevent a facility owner from contending that it is exempt from the bonding and decommissioning requirements by transferring 10 percent ownership of the facility. For example, the proposed rule language would apply to a transfer made in 2010, years before the legislature enacted the bonding requirement. For these reasons, the department has modified the rule as applied to facilities operating as of May 3, 2017, to require 10 percent landowner interest

commencing on the effective date of the statute, May 3, 2017.

COMMENT NO. 7: The inclusion in New Rule I(9) of partnerships or limited liability corporations as possible financial vehicles for attaining 10 percent ownership widens the possibility that this exemption could be assessed at a low barrier to entry. To follow the spirit of the statute, DEQ should strive to limit exemptions and place higher barriers to assessing exemptions. Therefore, caution is urged against the inclusion of these or other financial vehicles that may widen the possibility for a low barrier to accessing this exemption.

RESPONSE: The proposed definition accommodates different ownership structures that may exist for a wind generation facility. The ownership requirements apply to facilities owned by those types of entities.

COMMENT NO. 8: In the proposed definition of "significant investment" in New Rule I(12), a facility should be considered a new facility when an owner removes at least 75 percent of the wind turbines. The proposed rule requires that all of the wind turbines and existing pads be removed and replaced with new pads and turbines to be considered a new facility.

RESPONSE: A wind generation facility that is considered a new facility has 15 or 16 years from the commencement of commercial operation to submit a bond. Reducing the threshold to replacement of 75 percent of turbines to qualify as a new facility would cause incongruity at an existing wind facility where some turbines would be bonded at one date and other turbines would be bonded at a later date. The requirement for bonding is based on commencement of commercial operation of the entire facility, not just a portion of it. Therefore, a facility should be considered new when all of the turbines and pads are replaced. The department has not amended the rule to address this comment. For additional clarity, it should be understood that under New Rule VIII if a facility owner expands operation at an existing facility, the expanded operation is to be incorporated in the subsequent decommissioning plan update and become bonded during the next bond amount review cycle.

COMMENT NO. 9: The definition of "significant investment" in New Rule I(12) should be changed to account for decreasing costs of wind turbines that would cause the costs of repurposing the facility to be well below 50 percent of capital investment threshold required for significant investment.

RESPONSE: The department agrees that the rules should account for changing equipment costs to determine whether a significant investment has been made in an existing wind generation facility. Therefore, the department has amended the definition to provide a general standard to determine significant investment rather than a specific percentage of capital investment. The legislature clearly stated that for a facility to be considered repurposed, it requires an extension of its useful life by more than five years. The definition has been amended accordingly.

COMMENT NO. 10: In New Rule II(1), the owner of a wind generation facility should have to notify DEQ if the owner has a terminated power purchase

agreement, if the owner has agreed to expand the wind generation facility and if the owner has signed a new or modified power purchase agreement. This would help the department stay informed about conditions that may trigger decommissioning.

RESPONSE: The department believes that notification related to wind generation facility power purchase agreements and expansions is not information that is necessary in order for the department to implement these rules. To accommodate utility-owned facilities that do not operate with power purchase agreements, the rules are designed to meet the statutory decommissioning and bonding requirements with these notifications required in New Rule II(2).

COMMENT NO. 11: For completion of decommissioning, there should be a backstop in New Rule II(1) that forces the completion of activity. We suggest that an extension may be granted for a maximum of 24 months. After this, no further extensions may be granted.

RESPONSE: The rule requires completion of decommissioning within 24 months and provides for an extension only if an owner demonstrates good cause for an extension. The goal of this rule is to ensure proper decommissioning occurs in a timely manner (24 months) while allowing reasonable extensions where full decommissioning cannot be achieved in that time frame. Examples of a good cause for an extension could be weather and road concerns for bringing contractors and equipment to the facility, or demonstration of a financial commitment to repurpose a facility following a catastrophic failure that resulted in reaching an abandonment designation. The rule has not been modified.

COMMENT NO. 12: Although the department should not have to approve the initial decommissioning plan that is submitted at the commenced commercial operation, it makes sense to provide in New Rule II(4) and (5) that the department would review these plans for basic completeness to determine if there is (as an example) an as-built plan submitted that is signed by the appropriate person.

RESPONSE: The department appreciates this comment and similar comments made by other commenters. Under the rule language, the department is not required to review initial decommissioning plans. However, the department will endeavor to ensure compliance with decommissioning plan requirements are met in a timely manner. The rule has been amended to provide that the department may review initial decommissioning plans for completeness. To assist the department in determining whether to perform this review, the department has inserted in New Rule II(4) a requirement to provide information to determine whether the facility would be exempt from bonding under New Rule V(4)(b).

COMMENT NO. 13: It is assumed that, in New Rule II(6), if a plan has deficiencies, that it goes back and forth between the agency and owner to address those deficiencies until there is agreement that the plan is adequate. It is also assumed that this review could lead to DEQ's outright rejection of the plan if it remains deficient. If not, the ability for the agency to reject a plan should be explicit.

RESPONSE: A decommissioning plan found deficient is not an approved plan and owners of facilities are required to address all deficiencies prior to a plan being acceptable for use to set a bond amount. The rule as written provides a clear

framework for this process.

COMMENT NO. 14: The advance notice to the owner of a proposed site inspection should be provided in writing.

RESPONSE: The department is sensitive to the concern that an advanced site inspection notice be provided to owners in writing and that amendment has been made New Rule II(7).

COMMENT NO. 15: Specific decommissioning standards in New Rule III(1)(d) should be entirely deleted.

RESPONSE: The department's intent in New Rule III(1) was to establish clear, consistent, and reasonable expectations for decommissioning and restoration that achieve the decommissioning/reclamation requirements in 75-26-301(2), MCA. The department believes there is value in New Rule III(1)(d) to wind generation facilities by clarifying to facilities what their decommissioning plans must include. The department hopes these rules will minimize the department's receipt of incomplete or deficient decommissioning plans. Furthermore, the department anticipates this rule will reduce the amount of time it takes between the department receiving a decommissioning plan and the department determining a bond amount. For these reasons, the department is retaining New Rule III(1).

COMMENT NO. 16: There are concerns that a requirement to file as-built plans, including general structural and electrical information, in New Rule III(1)(b) will make those plans public records and accessible to the public under Montana's right to know laws. Such information could pose security risks at wind generation facilities. The department is encouraged to include in these rules a process to withhold the as-built plans for the security of these facilities, as per 2-6-1003, MCA, or allow for redacted plans or plans with lesser detail to avoid any security risks.

RESPONSE: The department has amended the rule to provide authority to allow redaction, a less detailed plan, or withholding of the plan if the owner demonstrates to the department's satisfaction that the requirements of 2-6-1003(2), MCA are met.

COMMENT NO. 17: Concerns exist in regard to the requirement in New Rule III(1)(c) requiring the decommissioning plan to include landowner/facility owner agreements and the confidentiality of information within some of those agreements. These concerns are: a) the reference to "any agreements" is too broad; b) the rule should expressly allow redaction of terms unrelated to decommissioning; c) the proposed rule needs to specifically provide for i) relevant affidavits signed by landowners, ii) redacted versions of relevant landowner agreements, or iii) separate confidentiality agreements between the owner and the department that provide for specific and binding protection of confidential commercial information that may be present within submitted landowner agreements.

RESPONSE: The department appreciates the comments and has changed the rule to address all concerns except for separate confidentiality agreements between the owner and the department. Owner confidentiality can be accomplished through redacted landowner agreements or a separate landowner agreement

specific to New Rule III(1)(c). While the department provides for the submittal of any signed landowner agreements that support alternative decommissioning and restoration plans from those in the rule, submittal of other landowner agreements is not required. The department will take the landowner agreements into consideration during the review of the decommissioning plan. The rule has been amended to clarify that only agreements with landowners pertaining to the non-removal of buildings, cabling, electrical components roads or any associated facilities and reclamation activities need be submitted to support the decommissioning plan.

COMMENT NO. 18: The term "associated facilities" must be defined to indicate it does not include turbine towers.

RESPONSE: It is not necessary to include a definition of associated facility to address the commenter's concern. The term "associated facilities" is used once in the rules. It is used in New Rule III(1)(c) to indicate that associated facilities may be subject to a non-removal agreement. However, both 75-26-301(2)(a), MCA, and New Rule III(1)(a) clearly require the removal of above ground wind turbine towers.

COMMENT NO. 19: The decommissioning of a wind generation facility should not include the decommissioning of substation and transmission facilities built to interconnect with wind generation facility to the electrical grid. The definition of "wind generation facility" in 75-26-301(7), MCA includes equipment used to generate electricity and does not include equipment used to connect the generating facility to the grid.

RESPONSE: The department recognizes this concern and has modified New Rule III(1)(d)(i) to clarify that decommissioning requirements do not apply to substations and transmission facilities connecting the wind generation facility with electric grid.

COMMENT NO. 20: Post-decommissioning land use is expected to return to primarily agriculture. Farming operations to prepare the surface topsoil for productive agricultural uses do not extend more than 12 inches below the land surface. The requirement in New Rule III(1)(d)(ii) to remove underground cables and/or conduit to a depth of 24 inches is excessive and will create additional linear disturbance to the surface lands during decommissioning that is onerous and unnecessary and often take many years for native grasslands and pasture to be restored and reclaimed.

RESPONSE: The department acknowledges that agricultural practices often extend to only 12 inches below the land surface. However, the department is requiring removal of underground cables and conduit to a depth of 24 inches to ensure that farm implements do not disturb these cables and conduits long after the facility has ceased operation. Land shifting from geologic activity and winter frost heave could cause underground cables and conduit to become a problem for future agricultural activities if remaining cables and conduit are less than 24 inches below the land surface. In addition, pursuant to New Rule III(1)(c), the landowner agreement can specify the non-removal of underground cables. For these reasons the department has not changed the requirement.

COMMENT NO. 21: The minimum depth of four feet for foundation removal in New Rule III(1)(d)(iii) is considerably deeper than a farmer's ground would ever be cultivated or used for any agricultural purposes. There is concern because as the depth to remove concrete increases both the impact of foundation removal and the costs of removal increases. Two commenters asked that either the depth be reduced to three feet or in the alternative that the rule be revised to allow a shallower depth if appropriate for post-operation land use. Another commenter requested removal of any specified depth and encouraged the depth be considered based on the post-decommissioning land use.

RESPONSE: The department recognizes that post-decommissioning land use may change from that occurring at the time of decommissioning. Future land uses can continuously change. Giving consideration to agricultural practices, the department has changed the minimum depth to which wind turbine foundation concrete must be removed to 36 inches and is giving facilities the option to propose an alternative depth on a case-by-case basis. Farm implements do not reach to a depth of 36 inches, but plant roots may reach this depth. A landowner always has the option to require deeper levels of concrete foundation removal if the landowner is concerned about future lower crop production in areas above the remaining foundations.

COMMENT NO. 22: The reseeding requirement in New Rule III(1)(d)(iv) needs to be enhanced. Although reseeding is an important first step in a reclamation project, it can fail and reestablishment of vegetation is the most important standard of reclamation. There needs to be a reasonable requirement that vegetation be reestablished before a bond can be released.

RESPONSE: The department agrees. The intent of this rule is to provide for successful revegetation of the site, and the rule has been amended to require successful revegetation.

COMMENT NO. 23: The requirement in New Rule III(1)(d)(vi) for removal and grading of access roads should be clarified provide that grading is to preconstruction condition or natural grade as appropriate.

RESPONSE: The department agrees and has amended the rule as suggested.

COMMENT NO. 24: New Rule IV(1) should be amended to require the department to supply owners with the department's estimated costs by a certain deadline prior to finalization of the bond and those costs should be based on acceptable estimating handbooks.

RESPONSE: The department has modified the rule to provide that the department must provide the proposed bond amount to and consult with the owner. New Rule IV(2)(a) already requires the use of acceptable handbooks and publications or other documented cost estimating handbooks or guides.

COMMENT NO. 25: Bond cost associated with the management and maintenance of the facility upon owner insolvency or abandonment should be limited to no more than 30 days.

RESPONSE: The department appreciates this comment but management and maintenance prior to and during decommissioning is generally not calculated in days. Management costs, as specified in various industry handbooks, is in reference to the project and is generally a percentage of the overall cost of work. Maintenance costs are generally accrued after the project is completed. These costs are generally minimal; however, some amount is needed for things like the possibility of vegetative failure, erosion, or road maintenance until the reclamation is stable. The suggested change has not been made.

COMMENT NO. 26: Alternatives for New Rule V should be considered to avoid the situation where an owner currently has a bond held by a private landowner and, with adoption of the rules, would then be required to post another bond with the state.

RESPONSE: Section 75-26-304(8)(a), MCA exempts the owner from the bonding requirement if the owner has provided a bond to certain governmental entities, but it does not exempt an owner who has provided bond to a private landowner. Therefore, the department does not have authority to adopt the proposed modification.

COMMENT NO. 27: In order to make the requirements of New Rule V(4) clear, it could be modified to state: "An owner of a wind generation facility is exempt from the requirements of MCA 75-26-301 (6) if:". This would make clear that a decommissioning plan must be created and submitted to the department regardless of achieving the 10 percent ownership exemption.

RESPONSE: The definition of "repurposed" in 75-26-301(6), MCA, is not applicable to the bonding exemptions in New Rule V(4), which addresses exemptions from bonding when a facility is already bonded with another governmental agency and the situation of the landowner owning 10 percent or greater share of the facility. Exemptions from bonding while repurposed are handled in New Rule V(3) and do not need to be duplicated in New Rule V(4).

New Rule II(4) and (5) already requires all facilities of 25 megawatts or greater to submit a decommissioning plan regardless of whether a facility is exempt from bonding. The proposed amendment is not necessary.

COMMENT NO. 28: Further specification is needed in New Rule V(4) regarding how the 10 percent ownership exemption is achieved in the case of a single facility having multiple landowners. The rule should provide that the exemption is available if all or a majority of landowners have approved its use and have approved the decommissioning plan.

RESPONSE: The proposed modification assumes that the exemption would apply even though some landowners do not own 10 percent of the facility. However, the department interprets 75-26-304(8)(b), MCA, to apply the exemption only if the entire facility is on land owned by the same landowner or landowners and that all landowners own a 10 percent share. The 10 percent share could be owned jointly or each landowner could own a 10 percent share. Therefore, the proposed modification has not been made.

COMMENT NO. 29: The prohibition in New Rule VII(1) on releasing the bond only after the successor submits its bond goes beyond the terms of 75-26-304(10), MCA.

RESPONSE: Section 75-26-304(10), MCA provides that the department shall release the predecessor bond no later than 90 days after transfer of the property. Given this clear mandatory language, the department agrees and the rule has been amended accordingly. The requirement of 75-26-304(10), MCA for the transferee to provide substitute bond within 90 days has been added.

COMMENT NO. 30: New Rule VII(2) should be amended to provide that department approval of the owner replacing any bond should not be unreasonably withheld.

RESPONSE: The rule has been amended to require the department to approve the replacement bond if it meets the requirements of the rules.

COMMENT NO. 31: New Rule VIII(1) should be amended to require that a decision on an application to reduce bond be made only after a conference with the owner and be subject to appeal by the owner if the reduction is denied or substantially reduced.

RESPONSE: The rule has been amended to require the department to consult with the owner before it denies the request in whole or in part. With regard to appeal, Title 75, chapter 26, part 3, MCA provides for appeals to the Board of Environmental Review only for the assessment of penalties for failure to post bond with the department. However, under case law of the Montana Supreme Court, an owner has the right to challenge the department's bond calculation in district court. See *Johansen v. State*, 228 Mont. 39, 955 P.2d 653 (1998).

COMMENT NO. 32: The department should be required to provide substantial and adequate justification for a decision that a bond amount must be increased pursuant to New Rule VIII(2) and that decision should be subject to appeal.

RESPONSE: In addition, the department has added a requirement that the department must prepare a written justification for the increase. With regard to appeal, see response to Comment No. 31.

COMMENT NO. 33: New Rule IX needs to be modified to include New Rules XI and XII (letters of credit and certificates of deposit).

RESPONSE: Letters of credit and certificates of deposit are forms of collateral bonds.

COMMENT NO. 34: The requirement in New Rule XI(1)(d) is not generally acceptable to most banks issuing letters of credit. The onus appears to be put on the issuing bank vs. the beneficiary in the event a letter of credit is still required but is not in place. No bank will take the responsibility to see if a department has not notified them of anything. Rather it should be upon notification only (as is the essence and spirit of a letter of credit). In addition, banks cannot logistically make letter of credit funds immediately available upon request as indicated in the rule.

RESPONSE: The department acknowledges that some banks may not agree to issue a letter of credit that meets this requirement. However, this requirement is necessary to ensure that the bond does not expire without a draw due to an oversight by the department. This requirement is applicable to letters of credit submitted as bond for hard rock mines. See ARM 17.24.146(1)(d). Furthermore, the department's bond forms for coal mines and gravel mines contain this provision. The department has received and is currently holding letters of credit that contain this provision.

COMMENT NO. 35: It makes sense to allow incremental bonding, based on phased repurposing and other circumstances.

RESPONSE: Provisions to allow for incremental bonding, based on phased repurposing, have not been added. The department appreciates the comment but feels a phased approach would unnecessarily complicate the bond calculation. In addition, the proposed rules better protect the State of Montana because an owner will need to wait until completion of the whole repurposing project before its bond is returned instead of releasing portions of the bond as different repurposing phases are completed. The department does not anticipate any other circumstances where the State of Montana would be well served by the incremental phasing in of bonding.

COMMENT NO. 36: New Rule XIV(3) should be amended to provide that commencement of decommissioning could be extended to begin 120 to 180 days after abandonment to allow greater flexibility for facility owners.

RESPONSE: Several commenters suggested alternative time frames for when decommissioning should begin after a facility is considered abandoned. A facility that meets the definition of abandonment will have had 12 months of marginal to no operation. Between the 12 months of marginal to no operation and the additional 90 days of lead time, there should be enough time to schedule contracts to begin decommissioning activities. If a facility has good reason that it cannot commence decommissioning activities for more than 90 days after abandonment, the facility has the option to request a longer lead time in an alternative written plan as allowed for in the rule. The department will consider each alternative written plan on a case-by-case basis. The plan must be approved by the department before a facility is assured of an alternate timeline.

COMMENT NO. 37: The department received both supportive and opposing comments regarding keeping the requirement in New Rule XIV(6) to file a map with the clerk and recorder. One commenter indicated that the filing of a map of remaining wind turbine foundations with the county recorder is unnecessary. Any remaining wind turbine foundation is simply another large rock below ground. There is no other map required of all the large rocks within a site boundary.

RESPONSE: The department appreciates both sets of comments and understands that natural features of similar or greater magnitude are likely to be unknown and not disclosed to property owners. The department considers information about locations of remaining wind turbine foundations necessary for current and future landowners to determine what existing structures may be below the ground. Filing this information with the county recorder will provide

documentation in one location that is accessible by future landowners. Facilities often are just leasing property and there would not be a record of the land use through a standard title search of the property. If a new wind facility is developed on the site, this map will provide documentation that will help the new wind facility owner and the department to determine an appropriate bond amount.

Reviewed by: DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ John F. North
JOHN F. NORTH
Rule Reviewer

By: /s/ Tom Livers
TOM LIVERS
Director

Certified to the Secretary of State, January 2, 2018.